Exxon Company, U.S.A., a Division of Exxon Corporation *and* New Jersey Esso Employees Association *and* Francis Nowak *and* Austin Bange

Exxon Company, U.S.A., a Division of Exxon Corporation and Exxon Chemical Americas, a Division of Exxon Chemical Company (a Division of Exxon Corporation) *and* Standard Refinery Union

Exxon Company, U.S.A., Bayway Refinery and Exxon Chemical Americas, Bayway Chemical Plant *and* Local Union 877, affiliated with International Brotherhood of Teamsters[1]

Exxon Company, U.S.A. (a Division of Exxon Corporation) Production Department, Central Division and Exxon Gas System, Inc. *and* Employee's Federation of Exxon Company, U.S.A., Production Department, Central Division and Exxon Gas Systems, Inc.

Exxon Company, U.S.A. (a Division of Exxon Corporation), Distribution East *and* Penn-Exxon Employees Association. Cases 22–CA–16791, 22–CA–16953, 22–CA–17247, 22–CA–16880, 22–CA–16642 (formerly Case 16–CA–14402), 22–CA–17221 (formerly Case 16–CA–14216–2), and 22–CA–18134 (formerly Case 4–CA–18448)

May 9, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On May 28, 1993, Administrative Law Judge James F. Morton issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The judge found, and we agree, that the Respondent bargained in good faith regarding 1989 revisions to its 1987 corporatewide substance abuse policy, that a valid impasse was reached, and that the Respondent then lawfully implemented its revisions.

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Charging Parties regarding the changes to its substance abuse policy. In lieu of testimony, the parties submitted an 81-point stipulation to the judge. The stipulation included in five places the provision that, ''Exxon was not willing to give on the revisions to the 1987 Alcohol and Drug Use Policy, but was willing to give in other areas in order to come to an agreement.'' The General Counsel contends that the above-quoted provision concerns only the 1989 revisions to the 1987 policy and the effects of those revisions on the unit employees, and not any other issues in the bargaining. The General Counsel notes that the only issue the parties were bargaining about at the time was the Alcohol and Drug Use Policy, and the Respondent admittedly refused to ''give'' on that issue. Consequently, the General Counsel claims that the Respondent engaged in bad-faith bargaining.

The Respondent contends that the stipulation should not be read that narrowly. Although the Respondent admits that it would not agree to change the language of the 1989 revisions, it argues that it was stipulated that it was willing to ''give'' on other issues in order to reach agreement and, therefore, did not refuse to bargain. The Respondent argues that it engaged in ''hard,'' but good-faith bargaining.

We find that the stipulation language in dispute broadly addresses the entire bargaining process, not just the 1989 revisions. Thus, it states that the Respondent ''was willing to give *in other areas* in order to come to an agreement.'' (Emphasis added.) Since the provision otherwise speaks of the Respondent's not making concessions on the 1989 revisions to the Alcohol and Drug Use Policy, we find that the most reasonable interpretation of the words ''other areas'' is that they refer to other issues in bargaining, apart from the 1989 revisions. The General Counsel bears the burden of proving the violation of the Act alleged in the complaint. Based on the stipulated facts before us, we find that the General Counsel failed to sustain that burden.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Julie Kaufman, Esq., for the General Counsel.
Russell M. Guttshall III, Esq., of Houston, Texas, and *John M. Baumann Jr., Esq.*, of Florham Park, New Jersey, for Respondent Exxon Company, U.S.A.
Howard A. Goldberger, Esq. (Goldberger & Finn), of Cranford, New Jersey, for several of the Charging Parties.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. These cases were consolidated for hearing as they all relate to

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

whether the Respondent[1] in the course of negotiations conducted by local bargaining committees for six employee units[2] failed to bargain in good faith respecting certain revisions in its corporatewide substance abuse policy before implementing those revisions for employees in these units. The complaint alleges that the Respondent thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).[3] The Respondent contends that it bargained in good faith with each of the labor organizations and that it implemented its substance abuse policy revisions only after valid impasses were reached.

I heard this case in Newark, New Jersey, on March 8, 1993. On the entire record which essentially consists of the formal papers, an 81-point written stipulation and related exhibits, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION–LABOR ORGANIZATIONS

The Respondent is engaged in the exploration, production, refining, and marketing of oil and petrochemical products and related products. In its operations annually, it meets the Board's nonretail jurisdictional standard.

The respective unions listed in the appendix are labor organizations as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

In 1987 the Respondent prepared and implemented for all employees throughout the corporation what it termed, a ''Policy Statement on Employees Alcohol and Drug Use.'' It made certain revisions in that policy on July 5, 1989, and, on September 1 of that year, it implemented those revisions for 20,000 of its employees, including executives, managerial, technical, and others of its employees. The revised policy was not implemented then as to the employees in the units referred to in the appendix or to employees at other locations where the implementation of the revisions was subject to collective bargaining at the local level.

The revisions in 1989 are additions to the 1987 policy. These state:

> However, an employee who has had or is found to have a substance abuse problem will not be permitted to work in designated positions[4] identified by management as being critical to the safety and well-being of employees, the public, or the Company. Any employee returning from rehabilitation will be required to participate in a Company-approved after-care program. Unannounced periodic or random testing will be conducted when an employee meets any one of the following conditions: has had a substance abuse problem or is working in a designated position identified by management, a position where testing is required by law, or a specified executive position. A positive test result or refusal to submit to a drug or alcohol test is grounds for disciplinary action, including dismissal.

The Respondent conducted contract negotiations separately with each of the unions named in the appendix. It was during those negotiations that the question of good faith arose as to the bargaining over the policy revisions.

The Respondent had different managers responsible for the negotiations in each of those units. For example, the Respondent's human resources advisor at Bayway, Ronald Kowalczyk, negotiated with officials of Local 877, Teamsters as to Unit A, and, for Unit B at Linden, the Respondent's manager there, J. D. Biavaschi, negotiated with officials of New Jersey Esso Employees Association.

The respective local bargaining representatives for the Respondent did not have authority to change the wording of the revised policy without senior management approval. Senior management officials did not meet with the bargaining committees of any of the labor organizations involved. The Respondent, in the course of discussing with the respective labor organizations, took the position that it was not willing to agree to changing its revised policy but was willing to give in on other bargaining areas in order to reach an agreement. In that regard, the Respondent's first affirmative defense set out in its answer states that it is ''barred from bargaining over the corporation-wide policy.''

As to Unit A, the respective bargaining committees of the Respondent and Local 877 Teamsters met seven times from July 28 to November 8, 1989, to discuss contract issues, including the implementation of the policy revisions among the employees in that unit. On November 8, 1989, Local 877's president wrote the Respondent's human resources advisor there that further discussions will be fruitless in view of the Respondent's propensity for citing national statistics in responding to Local 877's demands for an explanation as to why the policy revisions sought by the Respondent should be implemented, and in view of Local 877's claim that the drug policy then in affect was more than adequate, and in view of Local 877's assertion that the policy urged by the Respondent might be illegal. The Respondent's human resources advisor at that location wrote Local 877 the next day to say that Local 877's statement that ''further discussions will be useless'' when considered in conjunction with statements across the bargaining table, leaves the Respondent no alternative but to declare an impasse in negotiations. The Respondent's letter advised that the Respondent will implement the revisions on December 15, 1989, and that, should Local 877 reconsider and decide that bargaining would not be fruitless, it should notify the human resources advisor before November 17, 1989. On December 15, 1989, the Respondent implemented the revisions in Unit A.

Substantially similar negotiations took place for the employees in Units B, C, D, E, and F among the respective

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[1] The Respondent is comprised of Exxon Company, U.S.A., a Division of Exxon Corporation and Exxon Chemical Company, also a Division of Exxon Corporation.

[2] The appendix contains the unit descriptions and the names of labor organizations which represent the respective unit employees.

[3] The complaint also alleged that the implementation of the revised corporatewide policy adversely affected several named employees and that the Respondent thereby separately violated Sec. 8(a)(1) and (5) of the Act. At the hearing, the parties stipulated that those allegations were to be deferred, pending resolution of the issue framed above and that, if merit is found as to that issue, the employees affected would have a remedy available at a compliance stage of this case.

[4] Of the six units involved in this case, only Units B, E, and F have employees in designated positions.

local bargaining committees of the Respondent and the Union, resulting in declarations by the Respondent that impasse was reached and the implementation of the revisions.[5] The respective dates thereof are:

Unit	*Declaration of Impasse*	*Implementation of Revisions*
B	February 5, 1990	February 16, 1990
C & D	January 30, 1990	February 15, 1990
E	June 20, 1990	July 9, 1990
F	October 30, 1989	November 15, 1990

ANALYSIS

It is undisputed that the implementation of the revisions to the policy constituted a material change in the terms and conditions of employment of the employees in Units A through F. Bargaining thereon was mandatory. *Johnson-Bateman Co*., 295 NLRB 180, 182 (1989).

The General Counsel contends that there was no valid impasse in any of the units, A through F, because the Respondent had bargained in bad-faith before declaring impasse in each. The Respondent asserts that it engaged in hard bargaining to obtain agreement as to its policy revisions.

The General Counsel cites three factors to support the allegation of bad-faith bargaining—the failure of the Respondent to vest its local managers with full authority to change the policy revisions, the fact that the Respondent's senior management officials never met with any of the union representatives concerning these revisions, and the Respondent's ''blatant unwillingness'' to agree to any change in those revisions.

It is fairly obvious, to paraphrase an observation made by then Trial Examiner Leff in *Shell Oil Co*., 194 NLRB 988, 992 (1972), that the employer's managers, in conducting the negotiations, were expected to conform to centrally arrived at decisions with respect to companywide benefit plans. A refusal to make any change in a particular plan or policy, where there has been bargaining on all other terms and conditions of employment, is not a violation of an employer's duty to bargain collectively under Section 8(a)(5) of the Act. See *John S. Swift Co*., 124 NLRB 394 (1959). Also, cf. *Shell Oil*, supra, where the employer's insistence on maintaining corporatewide benefit plans was, implicitly, a valid bargaining position.

That the bargaining representatives of the Respondent could not, on their own, change the 1989 revisions, is not dispositive of the issue of good-faith bargaining. The authority given to a bargaining representative by an employer is but one of the factors to be weighed in determining whether it bargained in bad faith. Cf. *Fitzgerald Mills Corp*., 133 NLRB 877, 881 (1961), and cases cited therein at fn. 14. In *Fitzgerald*, the employer's representative was not empowered to modify any part of its complete counterproposal; that broad limitation and other factors were sufficient for the Board to find that there was a failure to bargain collectively. The facts in *Fitzgerald* differ vastly from those in the case before me. Here, the Respondent's representatives were free to make concessions on all aspects of bargaining, other than the 1989 revisions. The General Counsel's brief cites *Wycoff Steel, Inc*., 303 NLRB 517 (1991), as precedent to be followed; the employer's representative in that case was found to have ''no authority to negotiate in any meaningful way.'' *Wycoff Steel* is factually inapposite.

I find that there had been good-faith bargaining during the respective contract negotiations for the employees in Unit A through F,[6] that a valid bargaining impasse had been reached during the course thereof as to the revisions, and that the Respondent then lawfully implemented those revisions for the employees in Units A through F.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions named in the appendix are labor organizations defined in Section 2(5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

[5] The Respondent and the respective labor organizations reached accord on the other aspects of their bargaining as is evident from the collective-bargaining agreements covering Units A through F which, by their terms, became effective in 1990 or later, or were renewed year to year.

[6] Copies of the collective-bargaining agreements for these units are in evidence.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

(A) *BAYWAY UNIT*

All operating, mechanical and maintenance employees in the Bayway Refinery and Bayway Chemical Plant of the Companies, excluding office and plant clerical employees, watchpersons, guards, professional employees, technical employees, metal inspectors, gas testers, measurement persons and supervisors, as defined in the Act.

UNION: LOCAL UNION 877, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

(B) *LINDEN UNIT*

All drivers, helpers, checkers, mechanics, watchmen, plant clerical employees and other employees employed by Respondent in the State of New Jersey as described in the collective-bargaining agreement between Respondent Linden and NJEEA.

UNION: NEW JERSEY ESSO EMPLOYEES ASSOCIATION.

(C & D) *BAYONNE UNITS*

All operating, mechanical and maintenance employees at Respondent's Bayonne facility, excluding all clerical

employees, professional and technical employees, all laboratory technicians and all executives and supervisors as defined in the Act.

All ''Marine services'' employees employed in salary jobs at Respondent's Bayonne facility, but excluding confidential, professional, technical, executive, managerial and supervisory employees.

UNION: STANDARD REFINERY UNION

(E) *HOUSTON UNIT*

All production and maintenance employees in Exxon's Central Division of the Production Department and Exxon Gas System, Inc., excluding supervisors, confidental, managerial, professional and technical employees.

UNION: EMPLOYEES' FEDERATION

(E) *PENNSYLVANIA UNIT*

[Employees employed in the unit described in Part 112 and 211 of the collective-bargaining agreement between the Union named below and the Respondent.]

UNION: PENN-EXXON EMPLOYEES' ASSOCIATION